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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1198

THE TEXAS HIGHWAY DEPARTMENT, ET AL., *Petitioners*,

v.

NAMED INDIVIDUALS, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

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OCTOBER TERM, 1971

No. 71-

THE TEXAS HIGHWAY DEPARTMENT, ET AL., *Petitioners*,

v.

NAMED INDIVIDUALS, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Texas Highway Department and the other officers of the State of Texas named as defendants in the district court pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Fifth Circuit entered on December 20, 1971.

OPINIONS BELOW

The order of the court of appeals of which review is sought is not reported. It is set forth at page 1A of the Appendix to this petition. Earlier opinions and orders in this litigation, also set forth in the Appendix, are as follows:

(1) The orders of this Court granting and subsequently vacating a stay and denying an application for certiorari before judgment by the plaintiffs below are reported at 400 U.S. 939, 400 U.S. 961, and 400 U.S. 968. (App. 3A, 4A, 5A)

(2) The order of this Court denying an application for certiorari by the state defendants to vacate a stay

granted by the Court of Appeals for the Fifth Circuit is reported at 403 U.S. 932. (App. 20A)

(3) The opinion of the Court of Appeals for the Fifth Circuit, dated August 5, 1971, reversing a partial summary judgment granted by the District Court for the Western District of Texas to the defendants is reported at 446 F.2d 1013. (App. 21A)

(4) The order of the Court of Appeals for the Fifth Circuit, dated September 21, 1971, denying rehearing or rehearing en banc of its order of August 5, 1971, is reported at 446 F.2d 109. (App. 58A)

(5) The order of the District Court for the Western District of Texas, dated October 28, 1971, denying motions of the state defendants for dismissal or for summary judgment, and certifying the denial under 28 U.S.C. § 1292(b), is unreported. (App. 60A)

JURISDICTION

The order of the Court of Appeals for the Fifth Circuit was entered on December 20, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The implications of the unusual procedural posture of this case are discussed under Point B of Reasons for Granting the Writ.

QUESTION PRESENTED

Whether a state that applies for federal funds for highway construction, though it never receives final or legally effective approval of federal participation, may withdraw the application and construct the highway on its own, or whether the mere fact of application for federal assistance permanently binds the state in use of its own money to the conditions Congress has imposed on use of federal funds?

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are set forth in the Appendix beginning at page 64A. They include the following:

(1) Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. § 1653(f). The same language appears as § 138 of the Federal-Aid Highway Act of 1968, 23 U.S.C. § 138.

(2) Section 102(2) of the National Environmental Policy Act of 1969, 42 U.S.C. §4332.

STATEMENT OF THE CASE

This case arises out of a controversy, which began in 1955 or 1956, about construction of a freeway from downtown San Antonio to the San Antonio International Airport. The voters of San Antonio approved a bond issue for construction of the freeway in 1961 and in that year San Antonio and the Highway Department entered into a contract providing that San Antonio would acquire the necessary right-of-way and that the state would build the freeway.

In 1963 the state determined on the route of the freeway and, looking to possible federal participation by way of payment of 50% of the cost, held a public hearing as required by state and federal statutes. In 1964 the Bureau of Public Roads approved what had been done so far.

This litigation, seeking to prevent construction of the freeway insofar as it would use certain parklands, was commenced in December, 1967, by the San Antonio Conservation Society. The Society also sought to persuade the Secretary of Transportation to withhold approval of the project. After considerable negotiation between the Secretary and the state, the Secretary, on August 24, 1970, granted conditional approval to the two end segments of the freeway pending further study by an independent consultant of alternative routes for the middle segment. As the Solicitor General advised this Court when the case was here at an earlier stage, it was agreed between the Highway Department and the Department of Transportation that

should the Highway Department ultimately reject the Secretary's determination concerning the route location and design for the middle section, the Federal government would not participate financially in any portion of the expressway and would be reimbursed in full for Federal funds advanced in construction of the two end segments.

Brief for the Federal Respondents in Opposition at 7, *San Antonio Conservation Society v. Texas Highway Department*, 400 U.S. 968 (1970).

On November 13, 1970, the district court denied the Society's motion for a preliminary injunction, granted the motion of the federal and state defendants for summary judgment insofar as the two end segments of the freeway were concerned, and retained jurisdiction over the case to hear and consider challenges to the middle segment, when and if it were approved.

On November 18, 1970, the Fifth Circuit refused to stay the order of the district court, contracts for the construction were awarded November 19th or 20th, and construction soon began.

The San Antonio Conservation Society then determined to pursue the matter no further but some members of the Society decided to continue the suit and these "Named Individuals" applied to Justice Black for a stay. On December 7th the Court granted a stay pending prompt filing of a petition for certiorari, 400 U.S. 939, but on December 18th the Court vacated the stay, 400 U.S. 961, and on December 21st certiorari was denied, 400 U.S. 968.

Those opposed to the freeway again sought a stay of construction after the decision in March, 1971, in the *Overton Park* case. This stay was granted by the Fifth Circuit on May 27th, 1971, though this was later slightly modified to give the state an opportunity to have the stay considered by this Court before it became

effective. The relief sought by the state was denied by this Court on June 21, 1971, 403 U.S. 932.

The Fifth Circuit then heard on the merits the appeal from the partial summary judgment and, on August 5, 1971, it reversed and remanded

> with directions to hold the case until the Secretary has completed his administrative review of the North Expressway as one project under the law. * * * Construction shall not proceed until there has been full compliance with the law.

446 F.2d 1013, 1028-1029. A timely petition for rehearing was denied on September 21, 1971, 446 F.2d 1029.

On October 1, 1971, the Texas Highway Commission adopted a minute order severing its relation with the federal government on the whole length of the freeway and on that date notice was sent to the Federal Highway Administration unequivocally terminating the state's request for federal aid for the freeway. A check determined that federal funds, in the amount of $1,818,600, had already been transferred from the federal government to the state for the freeway. In accordance with the prior agreement between the state and federal authorities that the federal government would be reimbursed if the project were not finally approved by the Secretary, this sum was returned by the state to the Department of Transportation on November 2d.

The state defendants then asked the district court either to dismiss the action for want of jurisdiction, since there was no longer a federal question in the case, or to grant them summary judgment. The district court found this argument "persuasive" but thought it not clear that it was free to weigh the merits of the argument, in view of the mandate from the Fifth Circuit. It considered it important that the question whether the state was now free to proceed with its own funds

should be definitively answered as soon as possible, since "millions of dollars have already been spent on this project and the uncompleted work poses hazards to safety and welfare" (App. 62A). Accordingly on October 28th it denied the motions of the state defendants but certified the question they presented for interlocutory appeal under 28 U.S.C. § 1292(b).

A petition for permission to appeal was promptly filed with the Fifth Circuit and was supported by amicus curiae briefs from the City of San Antonio as well as from Citizens Committee for Completion of the North Expressway and North Loop 410 Association, Inc., groups that in five weeks had obtained more than 91,000 signatures on a petition urging completion of the freeway as planned. In addition, the Department of Transportation filed a memorandum supporting the position of the state defendants and saying that when the process of cancelling the contracts between it and the state was completed, the Department "will not have any authority to require the State of Texas to comply with the Federal-aid highway law." Department of Transportation Memorandum at 4. *Texas Highway Department v. Named Individuals*, Misc. No. 2243 (5th Cir., Dec. 20, 1971).

On December 20, 1971, the Fifth Circuit entered an order denying leave to appeal, and saying:

> Petitioners seek leave to raise on interlocutory appeal the same issue decided by this Court in part VII of our August 5, 1971, opinion in this case.

(App. 1A)

REASONS FOR GRANTING THE WRIT

A. *An important issue of federal statutory construction and of federal-state relations is presented.*

In a decision resting on "uneasy logic" and "a basic contradiction," Note, 50 TEXAS L. REV. 381, 384, 386

(1971), the court below has resolved an important question of federal law in a way supported by no prior decision and that is contrary to the position of the federal officer charged with administering the statutes in question. In doing so it has drastically increased federal power at the expense of the states and inserted new and unforeseeable hazards in cooperation between the states and the federal government.

It has always been understood that the federal highway statutes, like so many Acts of Congress, are not regulatory statutes but instead that they impose conditions on grants of federal funds. "The Federal regulations must be complied with in order to receive Federal funds. Such requirements do not limit or effect the authority of the State Highway Commission to select locations, construct and maintain highways in this State." *Futch v. Greer*, 353 S.W.2d 896, 900 (Tex.Civ.App. 1962), *cert. denied* 372 U.S. 913 (1963). Perhaps Congress could provide that no highway could be built anywhere in the United States, under any auspices, unless it had been approved by the Secretary of Transportation, in accordance with the standards set out in federal law. Such a statute would raise grave questions of the reach of the commerce power and the meaning of the Tenth Amendment. They are not in issue here because Congress patently has not enacted any such statute.

The identical provisions of 49 U.S.C. § 1653(f) and 23 U.S.C. §138 provide that the Secretary shall not approve any project as eligible for federal funds until he has made the determinations the statutes require, while the National Environmental Policy Act of 1969 requires a statement of environmental impact on proposals for "major federal actions." 42 U.S.C. § 4332. In the *Overton Park* case this Court repeatedly recognized that these are conditions on the use of federal funds.

> These statutes prohibit the Secretary of Transportation from authorizing the use of *federal funds* to finance the construction of highways through public parks if a "feasible and prudent" alternative route exists.
>
> * * * [T]he enactment of 4(f) of the Department of Transportation Act prevented distribution of *federal funds* for the section of the highway designated to go through Overton Park until the Secretary of Transportation determined whether the requirements of § 4(f) had been met. * * *
>
> Section 4(f) of the Department of Transportation Act and § 138 of the Federal-Aid Highway Act are clear and specific directives. * * * This language is a plain and explicit bar to use of *federal funds* for construction of highways through parks —only the most unusual situations are exempted.

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 405, 407, 411 (1971) (emphasis added). The converse was pointed out by Justice Douglas in his dissent from the denial of respondents' application for certiorari at any earlier stage in this case:

> No federal question would, of course, be presented if Texas or San Antonio decided to turn these parklands into a biological desert. But when Congress helps finance a project like this freeway, it becomes a federal project.

San Antonio Conservation Society v. Texas Highway Department, 400 U.S. 968, 978 (1970).

As matters presently stand Congress is not helping to finance this project. No federal funds will be used in its construction. Federal funds that had been advanced at an earlier stage have been repaid by the

Texas does not agree that this freeway would produce a "biological desert." Indeed, it does not agree the lands involved are parklands. Its legal position is, however, that it is free to build the highway with its own funds even if the land is parkland.

state to the federal government, in accordance with an earlier agreement between the state and federal authorities that the federal government would be repaid that money unless the Secretary gave final approval to the project.[1] Yet the Fifth Circuit has found that this is a federal project, that it is irrevocably so, and that the federal conditions on use of federal funds bind the state even though the state is using only state funds.

The process by which this result was reached below deserves examination, if only for its novelty. After stating the background the court below, in Parts IV to VI of its decision, held that the Secretary of Transportation had not complied with applicable federal statutes when, on August 13, 1970, he gave conditional approval to construction of the two end segments of the freeway. 446 F.2d at 1022-1027. With that portion of the opinion we presently have no quarrel. Our difficulty is with Part VII of the opinion. The Fifth Circuit there said:

> The North Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State as a partner in the construction of the project is bound by those laws.

446 F.2d at 1027. The Fifth Circuit cited nothing in any Act of Congress that calls for that result. It cited no authority in support of it. It failed to explain how,

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[1] See the statement of the Solicitor General, quoted p. 4 *supra*.

[2] In a footnote at the conclusion of the passage quoted the court said: "This principle has been characterized as 'beyond challenge' by the Supreme Court. *See* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295, 78 S.Ct. 1174, 1185, 2 L.Ed.2d 1313 (1958)." What *Ivanhoe* says at the page cited is: "Also beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property, and federal privileges."

in a single opinion, it could find the Secretary's approval on August 13th illegal and at the same time hold it effective to convert the freeway into a federal project and to make the federal laws binding on the state.

Probably Congress could provide that if a state applies for federal aid in building a highway, it must agree that it will never build the highway on its own if the application is not approved. A statute to this effect would be of dubious wisdom but at least would permit a state to know the risks it runs in asking for federal assistance. The majority of the court below were in error when they said that Texas "entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law." 446 F.2d at 1028. Texas could not have known—no one could have known prior to August 5th, when the opinion in this case came down—that the mere application for federal funds binds the state to all of the conditions of federal laws even if no federal funds are obtained and the application is later withdrawn. No statute says so. No prior case has ever so held.[1]

The view announced by the court below is contrary to the understanding of the statutory scheme held by the responsible administrators. The federal defendants supported the application of the state defendants on petition for rehearing in the Fifth Circuit and again in the district court and on the petition for leave to appeal. They said:

> It is the Federal Appellees position that the State of Texas would not be prohibited, as a matter of law, from constructing the North Expressway in San Antonio, Texas, with its own funds if the project is not to be financed with Federal funds.

[1] A subsequent case expressly refuses to decide whether it will follow the Fifth Circuit on this point, *La Raza Unida v. Volpe*, 3 ERC 1306, 1313 n. 5 (N.D.Cal., Nov. 9, 1971).

Memorandum in Support of State Appellees' Petition for Rehearing En Banc at 2, *Named Individual Members of San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971). This judgment of the responsible administrators is, of course, not conclusive, but is entitled to considerable weight. *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396, 408 (1961); *Town of New Windsor v. Ronan*, 3 ERC 1023, 1026 (S.D.N.Y., Aug. 42, 1971).

The importance of the statutes in which Congress has sought to protect the environment in the construction of federally-assisted highways can hardly be exaggerated. It is no less important that the circumstances in which they are or are not applicable be clearly understood. Only this Court can provide that understanding.

> While environmentalists will, predictably, applaud this case, other observers more concerned with federal-state relations will surely be troubled. The court has extended the reach of federal law without stating an underlying rationale. * * * For too long the power of Congress to impose conditions on federal funds has gone unexamined. Until the Supreme Court clearly defines the extent of this power and its doctrinal basis in relation to state autonomy, lower federal courts will remain unequipped to resolve adequately such fundamental questions of federalism as those presented in the instant case.

Note, 50 TEXAS L. REV. 381, 389 (1972).

B. The issue is properly here for review at this stage.

In form the present application asks this Court to review the refusal of the Fifth Circuit to grant leave

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See also the statement from a later memorandum of the Department of Transportation, quoted p. 6 *supra*.

to take a § 1292(b) appeal. It is hard to think of a less likely case to tender to this Court. But this is the form only. In fact the Fifth Circuit's order of December 20th is a final determination, subject only to review here, of the substantive issue raised by this petition, and the present proceeding is the only point in this litigation in which that issue could have been or can be brought here.

The precise question we present to this Court on this petition is the question that was put forward on the § 1292(b) application to the Fifth Circuit. That court's response was not the usual § 1292(b) response, that the court in its discretion does not wish to hear an interlocutory appeal on an issue but prefers to await final judgment. Instead the Fifth Circuit's stated reason for denying leave to raise the issue was that it had already decided the issue against the state. "Petitioners seek leave to raise on interlocutory appeal the same issue decided by this Court in Part VII of our August 5, 1971 opinion in this case" (App. 1A). We will endeavor to show that the Fifth Circuit could not have decided the issue on August 5th, in any legally effective sense, because it did not arise on the facts that then existed. Whether or not we are right about this, it is wholly clear that the Fifth Circuit thinks that it has decided the issue against the state and is not willing to consider it again. This Court takes "a pragmatic approach to the question of finality." *Brown Shoe Co. v. United States*, 370 U.S. 294, 306 (1962). Given that approach, the order of December 20th is a final resolution of an important issue, and is not merely a discretionary refusal of leave under the Interlocutory Appeals Act of 1958.

If this Court does not review this issue now, it can never review the issue in this case. Under the mandate of the Fifth Circuit in its opinion of August 5th, the district court is required to hold the case until the Secretary of Transportation has reviewed the project

and construction cannot proceed until there has been full compliance with the federal law. 446 F.2d at 1028-1029. Denial of certiorari would leave two courses open to the state. It could abandon the project and the litigation, leaving the "huge concrete offspring" that is already in existence. 446 F.2d at 1028. The more likely course, in view of the millions of dollars that have already been spent and the hazards to safety and welfare that the uncompleted work poses, as noted by the district court (App. 62A), is that the state would endeavor to secure approval of the Secretary for construction of the freeway. Only after it obtains that approval is it free to proceed further in the district court. But there would be no occasion at that stage for the state to seek again to bring the issue here, since it would already have complied with the federal regulations that, in its view, it is not required to comply with before spending its own funds.

Nor could this issue have been brought here at any earlier stage of the litigation. We of course accept the view of the Fifth Circuit that it decided the present issue against us in its August 5th decision, but that was hardly apparent at the time. Even if it had been clear that the Fifth Circuit was then deciding a question that was wholly hypothetical on the state of facts that then existed, that is hardly the kind of decision that this Court would be interested in reviewing.

The position of Texas was decisively different when the August 5th opinion was handed down, and when rehearing was denied on September 21st, than it is now. At the earlier times the state was contending that an injunction against the Secretary barring him from using federal funds should not carry with it an injunction to bar the state from continuing construction while the Secretary made a new review that the court of appeals ordered. In a document that was quoted by the Fifth Circuit, though technically it was not part of the record, the Highway Department advised

the court that the state was determined to build the highway with its own funds "if necessary." 446 F.2d at 1027. In the petition for rehearing below the state noted that the Secretary was then engaged in reviewing the entire project in the fashion the August 5th opinion required, and said:

> Texas hopes and expects that he will find that the conditions of Section 4(f) are satisfied and that federal assistance is available for building the highway on the route now proposed. If that should be the case, Texas is entitled to federal assistance and desires to receive it.

Petition for Rehearing on Behalf of the State Appellees at 5, *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 446 F.2d 1013 (5th Cir. 1971). At that point Texas was still attempting to get federal financing and had announced a willingness to go it alone only if all else failed. It was only on October 1st, after the petition for rehearing had been denied, that the state unequivocally terminated its request for federal funds.

There is a clear distinction between allowing construction to proceed while federal administrative review is pending and allowing it to resume after the application for federal funds has been finally withdrawn. In the first instance, the very fact that construction is proceeding tends to limit the Secretary's options and to induce him to tolerate environmental harm that he would prohibit were he writing on a clean slate. This is why several courts have recently held that the relevant provisions of federal law become applicable at an early stage in the planning process. *Lathan v. Volpe*, 3 ERC 1362, 1368 (9th Cir., Nov. 15, 1971); *Calvert Cliffs' Coordinating Committee v. United States Atomic Energy Commission*, 449 F.2d 1109, 1128 (D.C.Cir. 1971); *La Raza Unida v. Volpe*, 3 ERC 1306, 1314 (N.D.Cal., Nov. 9, 1971); *Morning-*

side-Lenox Park Assn. v. Volpe, 334 F.Supp. 132, 145-146 (N.D.Ga. 1971). Thus a decision that Texas could not build now and seek approval later would neither have been irrational nor inconsistent with a holding that Texas could proceed on its own if it unequivocally cut itself off from any possibility of federal financing. The August 5th opinion likened the relation between Texas and the federal government to a "marriage." 446 F.2d at 1028. Many things that are not permissible in a marriage are perfectly proper after divorce.

In the state's petition for rehearing of the August 5th decision it noted the ambiguity of that decision on whether it was announcing a permanent doom or one that lasted only so long as an application for federal assistance was pending, and said that "at a minimum the opinion should be clarified so that the parties may know what their rights are." Petition for Rehearing at 5. The Fifth Circuit, in denying rehearing, did not make that clarification, and the district court, on remand, was not clear which of these positions the Court of Appeals had taken (App. 62A).

Thus if, after the petition for rehearing was denied on September 21st, the state had sought certiorari on the question now presented, it would have faced the following obstacles:

(1) The court of appeals had remanded the case for further proceedings. This in itself normally makes a case "not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aristook R. Co.*, 389 U.S. 327, 328 (1967).

(2) On the record in the court below the question would have been a wholly hypothetical one, since it would never arise if the state continued to press its application for federal funds and the Secretary found that the federal requirements

were satisfied. The order of the Highway Department on October 1st could not possibly have been made a part of the record before this Court on review of the August 5th decision.

(3) Until the court of appeals announced on December 20th that it had already decided this question against the state on August 5th, there was no way of knowing that the court below had decided the question that a hypothetical earlier petition would have presented.

For all of these reasons, there was no realistic possibility that the state could have brought this question here at an earlier stage.

Even as late as November 5th, when the state filed its § 1292(b) petition with the Fifth Circuit, it could have proceeded instead by certiorari here to review the earlier decision of the Fifth Circuit if that had been an available course. Rehearing of the August 5th decision was denied on September 21st and the state had until December 20th to seek certiorari. But the order below denying leave to appeal and announcing that the issue had in fact been decided in August was not entered until December 20th. By the time the state was notified of it a petition for review of the earlier decision would have faced, in addition to the three formidable obstacles just described, the insuperable obstacle that it would then be untimely.

This case presents an extremely important question of federal-state relations and of the meaning and application of a vital federal statutory scheme. The question could not have been presented at an earlier stage in the litigation. It cannot be presented at any subsequent stage. Despite the unorthodox form in which the matter comes here, the decision of the Fifth Circuit on December 20th is a final decision of this important question and is open for review here.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MISC. NO. 2243

THE TEXAS HIGHWAY DEPARTMENT, ET AL., *Petitioners*

v.

NAMED INDIVIDUALS, *Respondent*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

BY THE COURT:

Petitioners seek leave to raise on interlocutory appeal the same issue decided by this Court in part VII of our August 5, 1971 opinion in this case. Petitioners again raised this issue in their petition for rehearing which was denied. This Court also denied the petition for rehearing en banc, no judge in active service having requested that the Court be polled on rehearing en banc.

IT IS ORDERED that leave to appeal from the interlocutory order of the United States District Court for the Western District of Texas entered on October 28, 1971 in the above styled and numbered cause, is hereby DENIED.

IT IS FURTHER ORDERED that the motion of the City of San Antonio, as amicus curiae, for leave

to file amicus curiae memorandum, is hereby GRANTED.

IT IS FURTHER ORDERED that the motion of Citizens Committee for Completion of the North Expressway, and North Loop 410 Association, Inc., as amici curiae, for leave to file amici curiae memorandum, is hereby GRANTED.

CLARK, Circuit Judge, concurring:

In view of my prior dissent in this cause, I deem it necessary to briefly explain my concurrence in this order. Upon remand to the court below, the parties stipulated that the United States of America made transfers of funds totaling 1,818,600 dollars to the State of Texas in reimbursement of costs incurred in connection with this highway project. The State of Texas has now delivered its warrant payable to the Treasurer of the United States in refund of such transfers. To extend the metaphor used in the original majority and dissent, this attempted dis-engagement comes too late.

I can only hope that the Secretary of Transportation and the Highway Department of the State of Texas will promptly proceed to discharge the responsibilities imposed by 23 U.S.C.A. § 138 (Supp. 1971); 42 U.S.C.A. § 4332 (Supp. 1971); and 49 U.S.C.A. § 1653(f) (Supp. 1971), so that the "huge concrete offspring already created," which the district judge finds possesses hazards to safety and welfare of the people of San Antonio, can be promptly and properly completed and utilized to serve the highest and best public interest, and that the demands of ecology will be met with common sense expedience.

No. —. SAN ANTONIO CONSERVATION SOCIETY ET AL. *v.* TEXAS HIGHWAY DEPARTMENT ET AL. C. A. 5th Cir. Application for stay presented to MR. JUSTICE BLACK, and by him referred to the Court, granted provided petition for writ of certiorari, before judgment, is filed in this Court by December 14, 1970. Briefs opposing such petition shall be filed by December 17, 1970. Both the petition for writ of certiorari and briefs in opposition may be submitted in typewritten form.

No. 1101. NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY *v.* TEXAS HIGHWAY DEPARTMENT ET AL. C. A. 5th Cir. Stay heretofore granted by the Court on December 7, 1970 [*ante*, p. 939], vacated. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL dissent from the entry of this order.

SUPREME COURT OF THE UNITED STATES

October Term, 1970

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY *v.* THE TEXAS HIGHWAY DEPARTMENT ET AL. AND THE U. S. DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 1101. Decided December 21, 1970

The petition for writ of certiorari is denied.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

This case disturbs me greatly. On December 7, 1970, this Court stayed the construction of two federally funded highways in order to save two public parks. One park serves the people of Memphis, Tennessee.[1] The park in this case is for the rest and recreation of the the people of San Antonio, Texas. Both cases involve important and timely problems of interpretation of § 138 of the Federal Aid Highway Act, passed by Congress to stem the destruction of our Nation's parks by highway builders. These cases give this Court an opportunity to insure that lower courts and certain federal agencies administer this vital environment-saving legislation in the way that Congress intended. The Tennessee case is still scheduled for oral argument at the earliest possible date—January 11, 1971. Yet, the Court now dissolves the stay previously entered in the San Antonio case and denies certiorari. I respectfully dissent from these orders.

The San Antonio park has two golf courses, a zoo, a sunken garden, an open air theater and many acres of

[1] See No. 1066, *Citizens to Preserve Overton Park, Inc., et al. v. Volpe.*

open space, covered with trees, flowers, and running brooks. It is a lovely place for people to retreat from the frantic pace of bustling urban life to enjoy the simple pleasures of open space, quiet solitude, and clean air. It is a refuge for young and old alike the kind of a park where a family man can take his wife and children or lovers can while away a sunny Sunday afternoon together. After today's decision, the people of San Antonio and the birds and animals that make their home in the park will share their quiet retreat with an ugly, smelly stream of traffic pouring down a super six-lane "North Expressway." Trees, shrubs and flowers will be mown down. The cars will spew forth air and noise pollution contaminating those acres not buried under concrete. Mothers will grow anxious and desert the park lest their children be crushed beneath the massive wheels of interstate trucks.

The San Antonio Conservation Society and its individual members filed suit to block federal approval and funding of this expressway. The United States District Court held that the Secretary of Transportation and state officials were free to proceed with federal funding and construction of two segments of the road coming into the park from north and south. It retained jurisdiction to review any later decision on the design and routing of the connecting middle section, which had not been formally approved by the Secretary.

In addition to substantial questions under the Federal Aid Highway Act, 23 U. S. C. § 138, this case involves the newly enacted National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852. The latter requires a detailed study of the probable effects before approval of "major Federal actions significantly affecting the quality of the human environment." 42 U. S. C. § 4332 (C). Even the respondent appears to concede that the decision to fund this expressway is a "major federal action" requiring careful study because he has promised that a

study will be made before the middle section is approved. However, the approval of the two end segments took place in August 1970, eight months *after* the effective date of the Act. It is undisputed that no environmental study has been made with respect to these two segments, which themselves desecrate parklands and which make the destruction of further parkland inevitable.

Section 138 of the Federal Aid Highway Act provides:

> "It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands . . . . [T]he *Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park*, recreation area or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State or local officials having jurisdiction thereof . . . . as so determined by such officials *unless (1) there is no feasible and prudent alternative to the use of such land*, and (2) such program includes all possible planning to minimize harm to such park . . . ." (Emphasis added.)

Even the Secretary admits that he has failed to make formal findings about feasible and prudent alternative routes.[1] Respondents have argued that formal findings are unnecessary. This seems an unlikely reading of the Act because without findings it will be difficult for courts to review the Secretary's determinations, and the intent of Congress to protect parklands is likely to be frustrated. Furthermore, it is simply not realistic

[1] Ironically, the Secretary of Transportation now appears to recognize that written findings should be made for highway grant-in-aid approvals and such findings are now provided for by his own regulation, Dept. Transportation Order 5610.1, issued October 7, 1970. But the Secretary has not been willing to apply his regulation to this case. In my view the regulation alone is sufficient reason to reverse and remand for findings of fact. Cf. *Thorpe v. Housing Auth. of Durham*, 393 U. S. 268 (1969).

to consider the construction of this expressway "section by section" as the District Court and the Secretary of Transportation have done here. Once construction is begun and heavy investment made on the two end segments, the available options for routing the middle segment are severely limited. In the words of the Act alternatives for the middle segment which were "feasible and prudent" will no longer be "feasible" once the two end segments are constructed.

In the last several years, Congress has enacted coordinated legislation designed to protect our Nation's environment from destruction by water pollution, air pollution, and noise pollution. This legislation has come about in response to aroused citizens who have awakened to the importance of a decent environment for our Nation's well-being and our very survival. Section 138 of the Federal Aid Highway Act and the National Environmental Policy Act are two major parts of this federal plan. The former was designed to prevent the systematic and thoughtless burial of public parks under the concrete of federally funded highways. The implementation of this legislation by the Department of Transportation is disheartening. The Act prohibits the Secretary from approving highway construction through parklands unless there is no "feasible and prudent" alternative. Congress has assigned a high value to parks, trees, and clean air. Parks are not to be condemned and taken in order to try to save a few dollars on a multi-million dollar highway project. Congress was willing to sacrifice parks only when there is "no feasible alternative." Yet the Secretary had proceeded without formal findings to approve two segments of a highway which devour parkland. And the two segments now approved stand like gun barrels pointing into the heartland of the park. The Secretary and his staff are not wholly inexperienced in highway construction. They know full well the difficulty of preserv-

ing the park's heartland once the barrels have been loaded and the guns cocked. The efforts of our citizens and the Congress to save our parklands and to preserve our environment deserve a more hospitable reception and more faithful observance than they have apparently found either in the Executive Branch, or thus far, in the courts.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE BRENNAN concur, dissenting.

This case is here on a stay presented to MR. JUSTICE BLACK and by him referred to the Court. We granted a stay pending consideration of a petition for certiorari before judgment of the Circuit Court of Appeals, which has now been filed. The Court dissolves the stay and denies certiorari, all without any opinion. I dissent. This is an important case that involves the construction of 9.6 miles of an expressway through 250 acres of the Brackenridge Basin-Olmos Basin parklands situated at the headwaters of the San Antonio River within the city of San Antonio. It involves the application of a new law—the National Environmental Policy Act (42 U. S. C. § 4331), which was signed by the President on January 1, 1970. The new Act applies by § 102 (2) to "all agencies of the federal government" and provides that such agencies shall include in every recommendation for

> "major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and

irretrievable commitments of resources which would be involved in the proposed action should it be implemented." Section 102(2)(C).

There can be no doubt that federal funding of a state highway project is covered by the 1970 Act. The most controversial aspect of the highway design and location is that it proposes to run a massive elevated eight- and six-lane expressway through a park in San Antonio. The Brackenridge-Olmos Basin parklands is a unique park, recreational, and open spaces area. Specific land uses include the original Brackenridge Park grant, the Sunken Gardens, and adjacent outdoor amphitheater, the San Jacinto Park, the Alamo Stadium, the San Antonio Zoo, the Olmos Basin picnic area, the Franklin Fields, and numerous other parks, public and open space areas.

Many including Senator Metcalf of Montana had sounded the alarm over the devastation caused by federal highways:

> "Today the land is being covered by four and six lane highways, supermarket parking lots, suburban

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Speech, Stanford University, April 9, 1970.

Senator Metcalf on January 28, 1971, spoke of the great need for consideration of ecological factors before highway construction was launched.

"When Congress authorized [illegible] I decided to determine the extent to which highway construction was threatening our streams and rivers. I sent questionnaires to federal and state transportation officials in each of our 50 states. Today, Mr. President, I have received responses from 49 States.

"The questionnaire consisted of 10 questions, one of which was: 'Are trout streams or other important fishing streams or lakes already affected by highway construction in your State?' Thirty-three of the forty-nine States which have responded to the questionnaire answered affirmatively, although damage varies in extensiveness from State to State.

"Perhaps more significant were the responses to the questions: 'Do you feel that additional legislation at the Federal or State level is necessary to bring about a satisfactory degree of consideration of highway and public transportation impacts and alternatives on your

high rise apartment buildings and lost to itself and to the people alike."

Parks—the breathing space of urban centers—were part of the concern of Congress, not only wilderness areas, rivers, lakes, and other aspects of the biosphere. The Senate Committee stated in its report:

"The inadequacy of present knowledge, policies, and institutions is reflected in our Nation's history, in our national attitudes, and in our contemporary life. We see increasing evidence of this inadequacy all around us: haphazard urban and suburban growth; crowding, congestion, and *conditions within our central cities* which result in civil unrest and detract from man's social and psychological well-being; *the loss of valuable open spaces;* inconsistent and, often, incoherent rural and urban land-use-policies; critical air and water pollution problems; *diminishing recreational opportunity;* continuing soil erosion; *the degradation of unique ecosystems;* needless deforestation; the decline and extinction of fish and wildlife species; *faltering and poorly designed transportation systems;* poor architectural

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State?' To this question, Mr. President, fish and game management men in 37 States replied 'Yes.' Two States were undecided about the necessity for legislation, and only seven see no need for action in this area.

"Mr. President, my questionnaire revealed general agreement among those most qualified to know, that there is a need for legislation. This is not a partisan, political issue; it is a conservation problem cutting across party lines, as shown by responses to my questionnaire. Fish and game officials working for Republican and Democratic State administrations agreed there is a need for legislation to protect fish, wildlife, and recreation resources from damage due to highway construction.

"Our bill, Mr. President, provides a method of meeting that need. I urge my colleagues to study the problem as it relates to their own States. I hope this matter will receive the attention of the Congress this year." 89th Cong. Rec. 828.

For the legislative history see the Appendix to the opinion.

> design and ugliness in public and private structures; *rising levels of noise;* the continued proliferation of pesticides and chemicals without adequate consideration of the consequences; radiation hazards; thermal pollution; an increasingly ugly landscape cluttered with billboards, powerlines, and junkyards; and many, many other environmental quality problems." S. Rep. No. 91-296, 91st Cong., 1st Sess., p. 4. (Italics added.)

The report noted that environmental programs were administered by 63 federal agencies located within 10 of the 13 departments, as well as in 16 independent agencies. *Id.*, at 6.

"Poor land-use policies and urban decay" can no longer be deferred, the report stated. *Id.*, at 5.

> "We no longer have the margins for error that we once enjoyed. The ultimate issue posed by shortsighted, conflicting, and often selfish demands and pressures upon the finite resources of the earth are clear." *Id.*, at 5.

And so the Act was drafted "to assure that all Federal agencies plan and work toward meeting the challenge of a better environment." *Id.*, at 9.

Yet in spite of this mandate embodied in § 102 (2)(c) the Department of Transportation has made no findings on the impact of this massive elevated freeway on the environment of San Antonio. The Court does not tell us why none need be made.

On August 4, 1970, the State, after revising its plans, agreed to the federal plan for the end segments of the projects. But we are advised that it was not until August 13, 1970, that the Secretary of Transportation approved the construction by Texas of the two end segments; and he has not yet approved the middle section. It is said:

> "The Secretary expressly reserved final approval on the middle section because there is much parkland contained in the middle section.

"As a matter of fact, one of the primary reasons the Secretary has not approved the middle section is due to the consideration of the views expressed by plaintiffs in opposition to the proposed route the middle section will take through the parklands."

We were told on November 16, 1970 that there are "at least four (4) possible alternative routes on which the middle section could be constructed to connect the two ends which the District Court has approved."

That is to say, 11 months after the Environmental Policy Act became effective, the gist of the location problem so far as the park is concerned had not been resolved.

The Solicitor General contends that the two end segments were approved in 1969. But the facts are that while Secretary Volpe gave preliminary approval of these segments on December 23, 1969, he withheld authorization of federal funds pending an agreement by the State to study further the middle segment. As already stated, Texas agreed to the end segments on August 4, 1970, and the Secretary gave his "unqualified approval" and authorization of them on August 13, 1970, long after the new Act became effective. Yet no findings under the 1970 Act were made.

It seems obvious, moreover, that approval of the two end segments has some effect on the alternatives for the middle section. For once the expressway is split into segments and each segment considered separately, the environmental impact of the entire project will turn at least in part on the fact that the two ends are already built.

The Solicitor General states: "The Secretary could well approve a route in the middle segment that would involve little or no use of parklands, or substantially less than the proposed route location now contemplates."

Thus we have a fair indication that some of the park is going to be a freeway regardless. Yet as I read the Act a federal highway project "significantly affecting" even an acre of park land cannot be launched without a finding on the environmental consequences.

The legal questions posed by § 102 (2)(c) include at least the following:

Should any piece of the park be destroyed to accommodate the freeway?

How can end segments of a highway aimed at the heart of a park be approved without appraising the dangers of drawing a dotted line between the two segments?

How important is the park to the people of San Antonio? How many use it? For what purposes? What wildlife does it embrace? To what extent will a massive eight and six-lane highway decrease the value of the park as a place of solitude or recreation?

What are the alternatives that would save the park completely? Could a passage by way of tunnels be devised? Could the freeway be rerouted so as to avoid the parklands completely and leave it as a sanctuary?

Is not the ruination of a sanctuary created for urban people an "irreversible and irretrievable" loss within the meaning of § 102 (2)(c)?

I do not think we will have a more important case this Term. Congress has been moving with alarm against the perils of the environment. One need not be an expert to realize how awful the consequences are when urban sanctuaries are filled with structures, paved with concrete or asphalt, and converted into thoroughfares of high speed modern traffic.

Those are some of the things with which Congress was concerned in the 1970 Act.

No federal question would, of course, be presented if Texas or San Antonio decided to turn these parklands into a biological desert. But when Congress helps finance a project like this freeway, it becomes a federal project. *See Wickard* v. *Filburn*, 317 U. S. 111, 131; *Ivanhoe Irrig. Dist.* v. *McCracken*, 357 U. S. 275, 295; *Simkin* v. *Memorial Hosp.*, 323 F. 2d 959. And if one thing is

The Federal Government is providing the funds for 50% of the cost of this expressway.

clear from the legislative history of this 1970 Act, it is that Congress has resolved that it will not allow federal agencies nor federal funds to be used in a predatory manner so far as the environment is concerned. Congress has, indeed, gone further and said that the Department of Transportation, like other federal agencies, may no longer act as engineers alone and design and construct freeways solely by engineering standards. Congress has said that ecology has become paramount and that nothing must be done by federal agencies which does ecological harm when there are alternative albeit more expensive, ways of achieving the result.

I would continue the stay, grant the petition for certiorari, 28 U. S. C. § 1254 (1), and let the bureaucracy know that § 102 (2) (c) is the law of the land to be observed meticulously.

Much of the legislative history of the Act is a discussion of air pollution, water pollution, and solid waste disposal. But when specifics are mentioned highway problems are present. And the mention of highway problems at every stage in the legislative history leaves no doubt that the Department of Transportation's highway programs are subject to the Act.

At the Senate Hearings on the Act, the Department was represented by the Assistant Secretary for Urban Systems and Environment. He immediately recognized the reason he was present.

> "I think that perhaps the reason that the Department of Transportation was asked to have a representative here before your committee was because within the purview of the Department of Transportation has lain in the past and will continue to lie in the future many of the activities that, at least, are most apparent to the people of the country in the field of environmental impact."

He talked about the views of those people who live in metropolitan areas of the country. They have, he stated:

> "a growing concern, though in most instances it is not a deep knowledge perhaps of the scientific implications . . . as to what might happen to life itself in some of the areas of which we are destroying our environment, it is concerned with the things they see about them in their daily lives. And in this area, I think, transportation and the activities of transportation organizations have been one of those which they have observed and which has created perhaps as much controversy and concern as any other area of the State and Federal operations."

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> Hearings before the Committee on Interior and Insular Affairs, United States Senate, 91st Cong., 1st Sess., on S. 1075, S. 237, and S. 1752, p. 76.

Included in the House Hearings is a letter from the Chairman of the House Subcommittee considering the 1970 Act to the Chairman of the President's Council on Environmental Quality which notes that neither the Department of Transportation nor the Department of Interior have promulgated the procedures they will use under the Act. "The fact there has not been full compliance by these Departments disturbs me greatly." House Hearings, No. 91-32, p. 67 (1969). And before the House Hearings were printed the Department of Transportation had complied with the request and the Department's procedures under the Act were printed with the House Hearings. *Id.*, at 153-159.

The debates on the Act on the floors of both Houses were relatively short, attesting in some measure to the popularity of enacting an extensive environmental bill. Yet just as the Senate and House Hearings had demonstrated that the Department of Transportation was an integral part of the Federal Government's creation of environmental problems, so, too, did the debates alert one to the fact that highways caused environmental problems when not approached from an ecological perspective. In the House only a handful of speakers addressed the bill for any length of time and all spoke in broad generalities. Rep. Pelly, a member of the subcommittee which considered the Act, provided the focus on the problems of highways.

> "We have experts in the field of transportation coping with the problem of moving people from one city to another in the least possible time with the greatest degree of safety. We have constructed a vast system of interstate highways to accomplish this. Yet at the same time, we have created serious problems of soil erosion, stream pollution, and urban displacement. . .

> ". . . The experts have, by and large, done their job well, but we must remember their job is building highways, increasing our food production, preventing floods and so on. Their primary concern is not with the quality of our environment considered as a totality." 115 Cong. Rec., 91st Cong., 1st Sess., 26573 (1970).

The Senate debates were also brief and again often dealt largely with the generalities of air and water pollution. Senator Allott, a member of the committee which considered the Act, recognized this and reminded his colleagues that more was involved.

> "I think there is a little too much of a tendency, probably not in the committees involved here, but on the part of the public, to regard environment as involving only air and water pollution . . . the environment does not involve only water and air; . . . it involves noise, and we are all becoming acutely conscious of this factor. More and more as time goes on environmental questions will also involve land distribution, planning for the future, what kind of future cities we will plan, and what we will do about the ghettos for the ghettos are a part of the environmental picture. . . ." *Id.*, at 29061.

Senator Jackson, chairman of the committee which considered the Act, reviewed the legislative history of the Act for the benefit of the other Senators. He stated that concepts and ideas were drawn from the many other bills before Congress when the Senate Committee considered the Act. These bills

> "were directly concerned with environmental issues, covering a broad area of interest—cleaning up the Nation's rivers and better approaches to smog control, improving the use of open space and prevention of disorderly encroachment by super-highways, factories and other developments . . . and the control

of urban sprawl, unsightly junk yards, billboards, and power facilities that lower the amenities of the landscape." *Id.*, at 29069.

Thus there can be no doubt but that Congress intended the Act to apply to federally funded highways and the Department of Transportation.

APPENDIX C

No. 1807. TEXAS HIGHWAY DEPARTMENT ET AL. *v.* NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY. Petition for certiorari before judgment to C. A. 5th Cir. denied.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30915

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL,
Plaintiffs-Appellants,

versus

THE TEXAS HIGHWAY DEPARTMENT, ET AL., and THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

(August 5, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

THORNBERRY, Circuit Judge: We enter a new battleground in this case, guided by the solemn expression of Congressional will to preserve parklands and the environment from harm or destruction at the hands of federal aid projects. This appeal challenges the construction of a six-to-eight lane federal-aid expressway through the Brackenridge-Olmos Parklands

located in the City of San Antonio, Texas. It comes to us from the district court's order granting the federal and state defendants' joint motion for summary judgment and denying the appellant's motion for preliminary injunction. Since it is an appeal from a summary judgment, we have given the appellants the benefit of all favorable inferences that reasonably may be drawn from the evidence. *See Poque v. Great Atlantic & Pacific Tea Co.*, 5th Cir. 1957, 242 F.2d 575; 6 *Moore's Federal Practice* ¶ 56.15[3]. So viewing the Record, we find supported therein the following long and tortuous tale of bitter controversy, which we relate along with the history of the proceedings to date in this action.

I. Background

The controversy over this highway began in 1955 or 1956 when certain officials in the City of San Antonio first suggested to the Texas Highway Department the building of a highway from what is now the San Antonio International Airport into downtown San Antonio. The highway was to be funded on a 50-50 basis between the City of San Antonio and the State of Texas for right-of-way acquisition costs, and on a 50-50 basis between the State of Texas and the federal government for construction costs.

A period of four or five years elapsed before the first steps were taken to implement the 1955 suggestion. Then, in 1959, the Texas Highway Department prepared a report for the construction of the highway, recommending two alternate routes, one of which was

the proposed present route through the Brackenridge-Olmos Parklands. In 1961, a bond issue election was held in San Antonio on the proposed acquisition of right-of-way for the new highway, which was to be called "the North Expressway." The bond issue passed by a vote of 40,799 to 23,775.[1]

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[1]The proposition that was presented to the voters of San Antonio described the subject highway simply as "a North Expressway to be constructed from the east leg of the Expressway west of Broadway to U. S. Highway No. 281 north of Loop 13." No particular route was otherwise specified on the proposition as it appeared on the voters' ballots. The state defendants have entered certain exhibits in the Record, in the form of newspaper clippings, which indicate that even at this early date the proposed route, which had not yet been unequivocally settled upon, was highly controversial. One of the clippings tells the following story:

> Several women members of the Conserve Our Parks Committee, opponents of the proposed N. Expressway to be voted on in the election, were ordered out of Brackenridge Park Tuesday after they attempted to erect a signboard near the Sunken Garden on Alpine Dr.
>
> The five foot sign read: "This is the view you will see of the Sunken Garden." Officials said the sign apparently was meant to represent a fence planned to deaden sound of traffic if the expressway were routed through the park.

San Antonio Express, Dec. 28, 1960, at 8A.

The State relies on this clipping, and others, to show that the voters of San Antonio knew what they were voting on when they voted on the Bond issue in 1961. Thus, they seem to argue, since the voters of San Antonio decided to finance part of the right-of-way for this highway in 1961, the controversy ended at that point, and we should defer to that determination. Even if the voters of San Antonio did know what they were voting on, however, the bond issue election was only the first step in a long series of steps necessary to obtain approval for the highway; as such it was but the first battle in the long war over this highway. And, as the history of this case demonstrates so vividly, the war is not over until the last battle has been won.

See also note 23 *infra*.

In 1963, the State actually settled upon the present proposed route through the Park, and at that time for the purpose of obtaining federal aid in the construction of the highway, the State conducted a Public Hearing on the "North Expressway," as required by 28 U.S.C.A. § 128.[2] In 1964, the Bureau of Public Roads,

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[2] 23 U.S.C.A. § 128 provided at that time that (a) [a]ny State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic effects of such a location. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

(b) When hearings have been held under subsection (a), the State department shall submit a copy of the transcript of said hearings to the Secretary, together with the certification. Section 128 has since been amended to provide as follows:

§ 128. Public hearings

(a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

a federal agency then in charge of supervising federally-funded highways, notified the State Highway Engineer that "insofar as public hearings are concerned, [we] will approve the successive steps in the development of this section of the highway."[3] Another three years elapsed during which the City of San Antonio litigated and negotiated for the acquisition of certain portions of the proposed right of way owned or abutted by private persons.[4] Then, in 1967, the San Antonio Conservation Society requested the City Council to seek rerouting of the North Expressway in order to save the Park. The City Council denied their request. Thereafter, in December 1967, the San Antonio Conservation Society filed this action and also sought through administrative appeals in the Department of Transportation and in other federal agencies, to persuade the Secretary of Transportation to withhold federal approval of the project. In January 1968, the Secretary of Transportation stated to the district court, in an affidavit filed by an official of the Bureau of Public Roads, that, as of that time, no federal approval had been given to this highway project referred to as the North Expressway.[5] In April 1968, the then Secre-

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[3] *See* note 23 *infra*.

[4] For related history, *see City of San Antonio v. Congregation of Sisters of Charity*, 360 S.W.2d 580 (Tex. Civ. App. — Waco 1962, no writ) *cert. denied*, 372 U.S. 967, 83 S.Ct. 1093 (1963); *City of San Antonio v. Congregation of Sisters of Charity*, 404 S.W.2d 333 (Tex. Civ. App. — Eastland 1966, no writ).

[5] The affidavit reads in pertinent part as follows:

> [A]s to U.S 281 (referred to as the North Expressway), there has been no approval by the Department of Transportation, the Federal Highway Administration or the Bureau of Public Roads of any Federal-aid funds for right-of-way acquisition or construction . . . .

tary Boyd asked that an analysis of the highway be prepared and, by telegram, requested that the district court take no action in the case until he had acted on the Conservation Society's appeals.

On September 23, 1968, the Department of Transportation issued a press release stating that Secretary Boyd "today announced conditional approval" of the State's request but the release stated specifically that "no part of the project will be approved until after [certain] design changes have been submitted to and approved by the Federal Highway Administration's Bureau of Public Roads."[6] This "conditional approval" never became final, however, because in February 1969 the State rejected the design changes requested by Secretary Boyd.

Following the State's refusal to accept Secretary Boyd's conditional approval, there were further meetings and discussions between those opposing the route and the Department of Transportation. On December 23, 1969, the Department of Transportation issued a press release which stated that the new Secretary Volpe "could not justify approval for construction of the North Expressway between Mulberry and Tuxedo Avenue [Mulberry being the southern border of Brackenridge Park, and Tuxedo being a northern

[6] At the time the Secretary announced this conditional approval, he also notified counsel for the San Antonio Conservation Society that "our approval of the project is not final, but rather is conditional upon the Texas State Highway Department making four design changes which must first be submitted to and approved by the Federal Highway Administration."

boundary of the Olmos Basin Parklands]." He called for a further study of this "middle segment." With respect to the two "end segments," however, the press release stated:

> Authorization will be given to the Texas Highway Department to construct those segments north of Tuxedo Avenue and south of Mulberry Avenue as soon as an agreement is reached to study an alternative route for the remaining segment.

As it had done with Secretary Boyd's conditional approval, the State also rejected Secretary Volpe's conditional approval, and in January 1970 made a counteroffer containing some conditions of its own on the Secretary's enforcement powers.[7] The Secretary rejected the States' proposal,[8] and the Department of Transportation advised that unless the State agreed to the conditions originally proposed, the Secretary's conditional

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[7] In its counteroffer, the State offered "to *initiate* studies and preparation of detailed cost estimates for that portion of the project between Mulberry and Tuxedo and to construct with Federal participation the sections north of Tuxedo and south of Mulberry," (emphasis added) but it stipulated that if the State could not "reach agreement with the Department of Transportation within six months after submission of the study to the DOT, the State of Texas will be free to proceed with construction on the section between Mulberry and Tuxedo with whatever funds may be available."

[8] The Federal Highway Administrator's response, rejecting the State's counteroffer, is instructive. He stated:

> The Secretary will not approve funds for the noncontroversial segments pursuant to any understanding *that would permit the Texas Highway Department to complete the North Expressway along a route ineligible for Federal participation.* (Emphasis added)

approval of the two end segments "must be withdrawn." In April 1970 the State of Texas responded that the Texas Highway Department "respectfully declines to make the study ..." It maintained that no further study was necessary because there were no alternatives. At this point, the appellants relaxed, thinking that, with the State refusing to meet the Secretary's conditions, "the battle for the Park had been won."[9] All was quiet[10] for a period of months; until August 4, 1970, when the Texas Highway Department agreed to the proposed study of the "middle segment" on the condition that federal funds would be made available for the two "end segments." On August 13, 1970, the Secretary, apparently without notice to the plaintiffs in the then pending suit challenging the North Expressway, authorized construction of the two "end segments" and an agreement was reached that an independent consultant would study alternatives to the "middle segment." On August 24, 1970, the State Highway Engineer was notified that he was authorized to advertise for bids. On September 1, 1970, the appel-

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[9]The appellants have entered in this Record an exhibit of some irony — a speech made by the Secretary of Transportation on "Earth Day" April 22, 1970, in which the Secretary, extolling the Department of Transportation's commitment to the preservation of parklands, stated, "We have made decisions in other areas — we saved a park in Memphis, Tennessee; another in San Antonio, Texas."

[10]Except for a rather critical meeting held on July 22, 1970, in Secretary Volpe's Washington office, attended by the Mayor of San Antonio, Texas United States Senator John Tower, officials of the Texas Highway Department and the Federal Highway Administrator. The appellants were not represented at this meeting. They complained below that they received no notice of it, and there is no denial of that claim. Yet, it was at this meeting that the principal decision which is the subject of this appeal was formulated.

lants revived their pending action in the court below, claiming that they had found out about the Secretary's action only through the newspaper; that the Secretary's action was in violation of the Department of Transportation Act of 1966, the Federal Aid to Highway Act of 1968, and the National Environmental Policy Act of 1969; and that they needed immediate protection to preserve the status quo, since the state defendants had filed notices of contract letting proposing to announce contract specifications on September 1 and September 8, 1970. No reply to this motion for interlocutory relief even was filed by the defendants until September 10, 1970, and the district court took no action on the appellants' motion for interlocutory relief until after the bids on the southern segment of the project had been made public sometime around September 20."

"The date on which the contract bids were made public assumed . . . considerable significance in this case because the opening of the bids triggered the tolling of a sixty day statutory period, in which the State had either to act on the bids or forfeit them. The bids on the southern "segment" of the Project were due to expire on November 20, 1970. Bids on the northern "segment" were due to expire a month later. Thus, when the appellant's first motion for stay pending appeal was presented to this Court on November 17, 1970 (discussed *infra*), only two days remained before the sixty-day period on the southern "segment" would expire. Likewise, the expiration date on the northern "segment" occurred somewhere around December 20, 1970, two days after the Supreme Court vacated its stay order in this case, (also discussed *infra*). The state and federal defendants relied heavily on these impending deadlines in opposing the appellants' stay motions, contending that a stay would cause irreparable harm to the low bidders, who would lose their advantageous positions, and to the State, since "rebidding probably would result in increased costs to . . . [the defendants]."

It is not clear to us why the district court failed to act immediately — one way or the other — upon the plaintiffs' mo-

tion for interlocutory relief, which was presented well in advance of the date on which the first bids were made public. The district court did hold a hearing on September 10, 1970, but announced no decision at that time on the appellants' motion for an injunction. A transcript of that hearing appears in the Record. It reveals that the district court set the matter for a hearing on the merits on October 19, almost a full month after the bids would have been made public. This date was set *at the request of the defendants.*

Thereafter, on October 8, 1970, the plaintiffs did file a motion for continuance because the defendants had failed to supply the plaintiffs with requested information concerning the Secretary's review of the project. There is no indication that this motion was ever acted on, but the Record does reveal that a subsequent motion for continuance filed by the state and federal defendants for additional time to file supporting documents to their joint motion for summary judgment was granted on October 16, 1970, causing the hearing set for October 19 to be moved up to October 28. At the hearing on October 28, the plaintiffs renewed their October 8 motion for continuance, contending that it had been on file for two weeks, that no response had been received from the defendants, and that they were still without the needed information concerning the Secretary's review of the project. The Court granted this motion for continuance, and reset the case for November 12, 1970.

We remark on this sequence of events only because we recall that on November 17, 1970, when this Court was presented with the appellants' first motion for stay two days before the bids were due to expire on the southern "segment," the state and federal defendants, in opposing the motion represented to this Court that the "nearness of hearing and judgment to the date for letting of contracts for construction was caused by a continuance of hearing granted at the request of petitioners;" that the last minute nature of the relief sought was "petitioners' fault;" and that at the September 10, 1970 hearing, "petitioners were not ready for trial."

We now find, upon reading the papers filed and the transcript of hearing below — which were not available to the Court in November — that these representations were not entirely supported by the Record. In the first place, it was the defendants, not the plaintiffs, who requested that the matter be postponed at the September 10 hearing. Indeed, the transcript of that hearing reveals that when the district court asked the plaintiffs whether they would agree to a postponed hearing, counsel for the plaintiffs, laboring under an apparent misunderstanding that the hearing on the merits would be a hearing not on

The matter was finally heard on the parties' opposing motions for summary judgment on November 12, 1970. On November 13, 1970, the district court denied appellants' motion for preliminary injunction, granted the defendants' joint motion for summary judgment insofar as the construction of the two "end segments" of the freeway was concerned, and retained jurisdiction over the case to hear and consider the complaints of the plaintiffs concerning the "middle segment." On November 16, the appellants filed a motion for stay pending appeal in this Court. This Court received the motion on November 17, 1970, and on November 18, 1970, denied the motion. On November 19 or 20, the State awarded the contracts to the low bidders and shortly thereafter construction on the southern segment commenced. On November 25, 1970, the President of the San Antonio Conservation Society wrote the Secretary of Transportation that the Society had, by Board action, dismissed all litigation on the North Expressway. Said the letter, "[I]t was a difficult deci-

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the two "end segments," but on the whole project, stated the following:

> Your honor, our motion, it sounds like, is virtually granted. They are willing to sit down and try this case .... We think — I think this case can be presented in full, and, in fact, *we can present it right now*, we feel, but to give them a chance to pull their case together, and *we are ready to proceed*. (Emphasis added)

Furthermore, it appears that the plaintiffs' motion for continuance was not filed until October 8, after the contract bids had been made public, and that the reason for their motion was the defendants' continued refusal to supply them with requested information. Finally, we notice that the defendants themselves contributed to the delay with their own motion for extra time to prepare their supporting documents.

sion to make but, in light of recent court action, it appeared to be the only reasonable choice at this time. Of course, we continue to deplore the possibility of desecration of public parklands by the route of this expressway."

Nevertheless, some members of the Conservation Society, disgruntled with the Board's action, decided to continue the suit, and thus came their present style; "Named Individual Members of the San Antonio Conservation Society."[12] The "Named Individuals" then applied to Mr. Justice Black for a stay. The Justice referred the matter to the entire Supreme Court, and the Court on December 7 granted the motion for stay on condition that "a petition for a writ of certiorari, before judgment, is filed in this Court by December 14, 1970." *San Antonio Conservation Society v. Texas Highway Department*, 400 U.S. 939, 91 S.Ct. 231 (1970).

[12] Although the state defendants have sought to make an issue of the Society Board's vote to discontinue the Society's participation in this suit, we see no reason why that vote should have any bearing on the appellant's right to continue. In the first place, both the original and supplemental complaints in this case were filed in the name of the San Antonio Conservation Society "*and individual members thereof.*" It frequently occurs, of course, that some parties to a lawsuit decide to quit at the trial level, while others determine to take an appeal. Secondly, the appellants' motion for stay was received in the Supreme Court, granted for a time, and while the petition for certiorari before judgment was denied, the appeal was not dismissed, as the defendants assert it should be here. Finally, a list of the named individuals who are carrying on this suit has been supplied to both the Supreme Court and to this Court. There is no merit, therefore, to the State's argument that members of the San Antonio Conservation Society may not carry on this suit in their own names after the Board of the Society has voted to discontinue its role in the litigation.

Accordingly, on December 14, 1970, the appellants filed a petition for certiorari, before judgment and on December 18, 1970, over the dissents of four Justices, the Supreme Court vacated its stay. *Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department*, 400 U.S. 961, 91 S.Ct. 361 (1970). Subsequently, on December 21, 1970, the Supreme Court denied certiorari, 400 U.S. 968, 91 S.Ct. 368 (1970). On March 2 1971, the Supreme Court handed down its decision in *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971), and soon thereafter, the persevering remnant of the otherwise litigation-weary San Antonio Conservation Society returned to this Court seeking reconsideration of our original denial of their motion for stay on grounds that conditions had now changed, and that the *Overton Park* decision compelled reversal of the district court's action in this case. Because the appellants were claiming that changed conditions warranted their reapplication for stay, we required them to reapply first to the district court for a stay, in compliance with F.R.A.P., Rule 8(a). The district court denied their motion on May 11, 1971, and they returned to this Court on May 18. After reviewing the file in the case, and studying the *Overton Park* decision, we concluded that this case is in all essential respects controlled by *Overton Park*, and we granted the appellants' motion for stay on May 27.

The entry of our stay order precipitated a virtual barrage of motions from the state and federal defendants seeking reconsideration of our stay order and a stay of the mandate on the order until they could seek

relief in the Supreme Court. On Memorial Day, May 31, 1971, the state and federal defendants presented their motions to a single member of this Panel, Judge Clark, in Jackson, Mississippi. On that day, Judge Clark entered a single judge order modifying our stay order to permit the contractors to continue with construction for one week, and then to proceed with "an orderly deactivation of each of ... [the construction] projects in such a manner as to preserve the work actually accomplished and as may be necessary to prevent soil erosion and maintain public safety." On June 1, 1971, the full Panel considered the state and federal defendants' motions, and on June 2, 1971 entered an order staying for a period of 15 days the mandate on our order of May 27, but only insofar as it applied to the State, in order that the State might seek relief in the Supreme Court. The State filed its motion for relief in the Supreme Court some 10 days later, and on June 21, 1971 it was unanimously denied by the Supreme Court. *Texas Highway Department v. Named Individual Members of the San Antonio Conservation Society*, 39 U.S.L.W. 3555 [No. 1807, June 22, 1971]. The state and federal defendants immediately filed motions to expedite the appeal. We granted their motions and set the matter down for hearing in New Orleans at the earliest possible date.

After hearing oral argument and studying the case on its merits, we remain convinced that our stay order of May 27 was completely justified by the *Overton Park* decision, and for the reasons stated herein, we reverse the judgment of the district court and remand the case

for further proceedings in strict accordance with this opinion.

II. Preservation of Parklands

The Brackenridge-Olmos Basin Parklands are unique park and recreation areas situated at the headwaters of the San Antonio River and surrounded by a densely populated urban area in San Antonio, Texas. The Parklands contain Sunken Gardens, an open air theatre, two golf courses, the San Antonio Zoo, picnic areas, nature trails, and many acres of green, open space. While there is a factual dispute concerning the exact number of acres threatened by this proposed expressway,[13] it appears that the expressway will require the use of between 116 and 250 acres of parkland.

In recent years, the Congress of the United States has enacted several statutes designed to preserve just such parks as this from destruction by massive federal projects.[14] Specifically, we deal with three such stat-

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[13]This is one of several factual disputes emerging from the pleadings and affidavits filed in the court below, where summary judgment was entered. Not all the factual discrepancies arising from the pleadings and affidavits, however, concerned material issues. For example, this issue of exactly how many acres of parkland are to be taken is immaterial for summary judgment purposes because it is clear that *some* parkland has been, or is to be, used. The relevant statutes in this case apply to projects which require the use of *ANY* parkland. *See, e.g.*, 23 U.S.C.A. § 138 (Supp. 1971).

[14]Indeed, the legislative history of section 4(f) reveals that the Brackenridge Park controversy was foremost in the minds of the Senators as they debated this Act and rejected a House amendment that was specifically designed to allow federal participation in the North Expressway. The Senate version prevailed. *Compare* 114 Cong. Rec. 90th Cong. 2d Sess., 19914, 19915 *with*, 114 Cong. Rec. 90th Cong. Rec. 2d sess., 24023, 24032 (1968).

utes in this case: (1) Section 4(f) of the Department of Transportation Act of 1966, 23 U.S.C.A. § 138 (Supp. 1971), which provides as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

(2) Section 138 of the Federal Aid to Highway Act of 1968, 49 U.S.C.A. § 1653(f) (Supp. 1971), which provides as follows:[15]

> (f) It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After August 23, 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to min-

[15] Since section 138 of the Federal Aid to Highway Act tracks, almost word for word, section 4(f) of the Department of Transportation Act of 1966, our references to section 4(f) hereinafter should be construed to include a reference to section 138 of the Federal Aid to Highway Act.

imize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

(3) Section 102(2) of the National Environmental Policy Act of 1969, which provides in pertinent part, that[16]

> all agencies of the Federal Government shall
>
> ...
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on —
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

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[16] 42 U.S.C.A. § 4332 (Supp. 1971).

> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

It is these statutes which, through our judgment, we enforce herein.

III. Noncompliance with the Statutory Law

Our task is simplified greatly to begin with because it is undisputed that the Secretary of Transportation complied with none of the above-quoted statutes in his approval of the two "end segments" of this expressway. No environmental study under N.E.P.A. has been made with respect to these two "end segments," and the Secretary has demonstrated no effort by anyone to examine the section 4(f) "feasible and prudent" al-

ternatives to the route followed by these two "end segments," which come right up to, if not in to, the Parklands from both the north and the south. Thus, it requires no discussion to establish that there has been no compliance with any of the above-quoted statutes.

Instead, we must devote our efforts to examining the numerous defenses[17] raised by the federal and state defendants seeking to establish their positions that for various reasons these statutes do not apply to the North Expressway.

IV. Division of the North Expressway into Three Segments

Both the state and federal defendants argue that section 4(f) does not apply to this case because the construction of the two "end segments" involves no taking of parkland, and because there is nothing unlawful in the Secretary's division of the project into three "segments" for purposes of section 4(f) approval.

In the first place, there is a factual dispute between the parties over whether any parkland is taken by the two "end segments." If that issue were material therefore, the mere existence of a disputed fact manifestly would require us to reverse the district court's summary judgment, since summary judgment is al-

[17]We have discussed in the text only the major contentions of the federal and state defendants. We have treated other of their defenses in footnotes. Their remaining defenses have been considered and disposed of without comment on grounds that they lack merit and warrant no discussion.

ways improper when there are disputed issues of material fact. We have determined, however, that it is unnecessary to base our decision on the existence of a factual dispute over whether parklands are taken by the two "end segments," because we have concluded that the Secretary's division of the project into three "segments," for purposes of giving his approval to the two "end segments," was unauthorized by section 4(f). Section 4(f) provides that "the Secretary *shall not approve* any ... *project* which requires the use of any publicly owned land from a public park ..." Section 4(f) does not authorize the Secretary to separate a "project" into "segments." In short, the Secretary acted beyond the scope of his authority and in violation of section 4(f) when he approved "segments" of a project before he had complied with his section 4(f) responsibilities.[18]

We note that the word "project" becomes a key word in the statute on this point. While it is conceivable that in other cases the question of how broadly the Secretary must define "project" may be presented, that question is not, and never has been, presented in this

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[18]The defendants argue that there is "no law which would prohibit" the Secretary from dividing the projects into three segments. This argument misses the point. The Secretary is not so omnipotent that he must be presumed to possess power to act as he chooses unless there is some law prohibiting him from so acting. He possesses only the power which Congress has given him, and the scope of that power is defined by Congress. His action is specifically reviewable under the Federal Administrative Procedure Act, 5 U.S.C.A. § 706(a) (C) for being "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

case.[19] There is nothing in this Record to support the conclusion that the North Expressway has ever been anything but one project for purposes of federal approval. It has consistently been denominated the "North Expressway." It was presented as a single project at the Public Hearing in 1963. The state defendants presented it to the federal defendants as a single project for federal participation. And indeed the Secretary's attempt to condition federal approval of the entire project on a section 4(f) study of the middle "segment" demonstrates that he has construed it as one "project" for purposes of section 4(f).

The question therefore is whether the Secretary may take a single "project" and divide it into "segments" for purposes of section 4(f) approval. We have already stated that such fragmentation of a "project" is unauthorized by section 4(f). But there is another reason why we refuse to authorize such action: The frustrating effect such piecemeal administrative approvals would have on the vitality of section 4(f) is plain for any man to see. Patently, the construction of these two "end segments" to the very border, if not into the Parklands, will make destruction of further parklands inevitable, or, at least, will severely limit the number of "feasible and prudent" alternatives to avoiding the Park. The Secretary's approach to his section 4(f) responsibilities thus makes a joke

[19]The federal defendants purport to rely on the letting of the contracts in "segments" as evidence that the project "had always been divided into three segments." This, of course, is of no probative value since the letting of the contracts occurred after, not before, the Secretary's decision to fragment the project.

of the "feasible and prudent alternatives" standard, and we not only decline to give such an approach our imprimatur, we specifically declare it unlawful.[20]

At this point, we would comment on one final argument made by the Secretary in defense of his piecemeal approval. He contends that the appellants' argument against piecemeal approval depends for success "on innuendos, utter bad faith, and some conspiracy type of clandestine activity on the part of the Secretary . . . to build this highway 'come hell or high water.'" The appellants' brief, however, makes no charges of conspiracy or clandestine activity on the part of the Secretary. And the Secretary is wrong if he is suggesting that a finding of "bad faith" is essential to support a holding that he violated the applicable law in this case. By the Secretary's own admission,[21] he adopted this piecemeal solution in order to defuse a controversial situation by attempting to strike a compromise between those who were determined to build the highway and those who were determined to save the Park. The problem with the Secretary's solution to the controversy is that he misconceived his role. The conflict between Parklands and Highways has *already* been resolved in the Halls of Congress, which is the proper

[20] The type of piecemeal planning evident here has been held unlawful in other cases. *See Citizens Committee for the Hudson Valley v. Volpe*, S.D.N.Y. 1969, 302 F. Supp. 1083, *aff'd*. 2d Cir., 425 F.2d 97, *cert. denied*, 400 U.S. 949, 91 S.Ct. 237 (1970); *D.C. Federation of Civic Ass'ns v. Volpe*, 316 F. Supp. 754 (D.D.C. 1970).

[21] The Secretary states in his brief that he acted "to satisfy the various competing interests in the total highway . . . [and] to approve construction of the two ends . . . where the controversy centered on the middle section."

place in our system of Government for priority decisions to be made. And, as the statutes here in question make clear, parklands and environmental values are considered paramount. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. at ____, 91 S.Ct. at 821-22 (1971).

V. National Environmental Policy Act of 1969

Both the federal and state defendants argue that NEPA has no application to this Project. The federal defendants' position, however, is predicated on their argument that the division of the Project into segments was permissible, and that since the two end segments involved no taking of parklands, NEPA did not apply. We have already dealt with, and rejected, this argument. We proceed, therefore, to the State's arguments.

Section 102(2) of the National Environmental Policy Act of 1969, 42 U.S.C.A. § 4332 (Supp. 1971), requires "all agencies of the federal government ... [to] include in every recommendation or report on proposals for ... major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on

> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

It is undisputed that no section 102(2) statement has been prepared or filed by anyone in this case. The State argues none was required because (a) federal authorization of a federal-aid highway is not a "recommendation" within the meaning of section 102(2); (b) there is no one for the Secretary to make his report or recommendation to; and (c) "approval of a section of a roadway in Texas" is not a major federal action within the meaning of the statute.

The legislative history of NEPA and the language of the statute itself refute each of these arguments. That federal-aid highways were among the federal actions affecting the human environment, and therefore covered by the Act, can be seen from the hearings and debates over the Act. "Super-highways" were pointedly cited among the list of modern phenomena threatening the environment. *See* 115 Cong. Rec. 91st Cong., 1st Sess., 29068 (1970). And the Department of Transportation was asked to send, and did send, a rep-

resentative to testify at the Senate hearings on the Act.[22]

To the State's argument that there is no one for the Secretary to file a statement with, the language of section 102(2) provides an answer: "[c]opies of ... [the] statement ... shall be made available to the President, the Council on Environmental Quality, and to the public ..., and shall accompany the proposal through the existing review processes ..."

Finally, the State's argument that this is not a major federal action seems doubtful. It has been estimated that the project ultimately will cost a total of $18,000,000.00. Total *initial* costs, according to the defendants' pleadings, were projected *in 1960* at $12,600,000.00, of which half was to be funded by the federal government. Without belaboring the point, we conclude that we have no difficulty in characterizing a project of this size as "major."

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22 At the Senate Hearings, DOT was represented by the Assistant Secretary for Urban Systems and Environment, who stated the following:

> I think that perhaps the reason that the Department of Transportation was asked to have a representative here before your Committee was because *within the purview of the Department of Transportation has lain in the past and will continue to lie in the future many of the activities that at least, are most apparent to the people of the country in the field of environmental impact.*

Hearings Before the Committee on Interior and Insular Affairs, United States Senate, 91st Cong., 1st Sess. on S.1075, S.237, (emphasis added) at 76 (1969).

The State also argues that NEPA does not apply to this Project because NEPA cannot be applied retroactively. The simple answer to this contention is that no retroactivity would be involved in the application of NEPA to this case. NEPA was the law at the time the Secretary authorized federal funding of the two "end segments" of the North Expressway on August 13, 1970, and it had been the law since January 1, 1970.[23]

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[23]The State has argued throughout its brief that because of the completion before NEPA and section 4(f) of certain steps in the process of obtaining approval of this North Expressway, it is now too late to apply those statutes to this case. Specifically, the State has relied on the bond issue election in 1961, note 1 *supra*, the Bureau of Public Roads approval of the Public Hearing in 1963, *supra*, note 3, and the acquisition of part of the right-of-way. As we pointed out in note 1, *supra*, the legality of this Project has been contested from its inception, and the contest has been an ongoing one. The Secretary's approval of the Project for federal funding was the last step in the process, subject, of course, to judicial review. And since the Secretary's approval came on August 13, 1970, that date becomes the operative date for determining what law should apply in this case. This much is clear from the *Overton Park* case, which, as the State has admitted, note 25 *infra*, is "strikingly similar" to the instant case. In *Overton Park*, the Bureau of Public Roads had given route approval in 1956; local officials had already made a determination to go through the Park; and acquisition of right-of-way had been approved in 1967.

We recognize, of course, that there have been several cases which have declined to apply NEPA retroactively. *See Investment Syndicates v. Richmond*, D. Ore. 1970, 318 F. Supp. 1038; *Brookes v. Volpe*, W.D. Wash. 1970, 318 F. Supp. 90 (1970); *Pennsylvania Environmental Council, Inc., v. Bartlett*, M.D. Pa. 1970, 315 F. Supp. 238. In each of these cases, however, the critical act of federal approval of the challenged project had come prior to the effective date of NEPA, January 1, 1970. In *Bartlett*, the project was approved on November 20, 1969; in *Richmond*, Congress had approved the project in 1967; and in *Brookes*, the critical determination had been made in 1967.

We move next to two defenses presented by the State in which the federal defendants do not participate.

VI. Are the Brackenridge-Olmos Parklands of Local Significance?

Section 4(f) of the Department of Transportation Act protects from federal-aid highways parks "of local significance as determined by the Federal, State or local officials having jurisdiction thereof ..."

After section 4(f) was passed and became effective, the City Council of San Antonio passed the following resolution:

> The portions of public lands owned by the City of San Antonio and required by present plans for the construction of this expressway facility are of *primary local significance* as part of the right of way for the North Expressway and of *secondary local significance* as parts of park and recreation areas.[24] (Emphasis in original).

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[24]The Resolution was a transparent attempt to by-pass section 4(f). Among the "whereas" clauses, we find the following:

> Whereas, the Congress of the United States of America in 1968 amended section 4(f) of the Department of Transportation Act and Section 138 of Title 23 of the United States Code so as to include identical declarations of policy in each instance, reading in part as follows ... [whereafter section 4(f) is quoted]

Shortly thereafter followed the resolution quoted in the text above.

The State argues that this resolution is a determination by local officials that Brackenridge Park is of "no local significance." The Resolution, however, does not say that Brackenridge Park is of no local significance. Indeed, it says that Brackenridge Park *is* of local significance as a Park, but that the City Council would prefer to see it used for a highway. The question, therefore, is whether Congress intended to leave the choice between parks of local significance and federal-aid highways to local authorities; or whether Congress, in passing section 4(f), has already made the choice between the two uses. Only one construction fairly can be given to section 4(f), and that is that Congress itself has made the choice between the two uses. Clearly, Congress did not intend to leave the decision whether federal funds would be used to build highways through parks of local significance up to the city councils across the nation. If there was any doubt about this question before *Overton Park*, there most assuredly is no longer any doubt. The following appears in the district court's opinion in *Overton Park*:

> With respect to the reference to "... local preference" it should here be pointed out that the Mayor and City Council of the City of Memphis have heretofore approved this corridor and design and have approved the sale of the strip through Overton Park to the State of Tennessee .... Since [section 4(f)] by its terms is invoked only if park "is of local significance as determined by federal, state or local officials having jurisdiction thereof" in view of the approval by the Mayor and Council, it may

well be that [section 4(f)] has no application here.

Citizens to Preserve Overton Park v. Volpe, W.D. Tenn. 1970, 309 F. Supp. 1189, 1195.

The Record in this case reveals that the state defendants relied heavily on this district court opinion in opposing application of section 4(f) to the North Expressway.[25] Now, of course, that argument is foreclosed by the Supreme Court's decision in reversing the district court in *Overton Park*. We must conclude from the Supreme Court's action that the Court attached little if any significance to the local officials' preference to use Overton Park for highway right-of-way.[26]

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[25]The following language appears in a letter dated April 7, 1970 from Chairman Greer of the Texas Highway Commission to Mr. Francis C. Turner, the Federal Highway Administrator:

> ... due recognition should be given to the fact that courts in other areas of the country have already ruled in favor of Highway Departments in cases raising the same objections as continue to be repeated by the San Antonio Conservation Society. We refer specifically to the ... [case] ... involving the Overton Park in Memphis.
>
> *The situation in Memphis, as we understand it, is strikingly similar to our situation in San Antonio in the following respects:*
>
> A. Both route locations were established long before Congress made any provision for preservation of parklands in federal highway laws.
>
> B. Much of the right of way had been acquired prior to the time the active legal controversy arose.
>
> C. The Mayor and City Council ... had approved the route location.
>
> D. Remedial measures had already been taken to restore areas and facilities taken from the parks involved.

[26]The Supreme Court was clearly aware of the Memphis City Council's decision in *Overton Park*. See 401 U.S. at 408, 91 S.Ct. 25 819.

VII. May the State Now Proceed with this Project Using its Own Funds?

The State argues that it is "absolutely committed" to building the North Expressway regardless of what this Court decides about the validity of the Secretary's action, and that this Court has no power to require the State to comply with the law in building the Project because the State is determined to build the highway with its own funds, "if necessary." In connection with this argument, the State has presented this Court with a document which was not part of the Record on appeal, but which deserves reproduction in this opinion. The document is a Minute Order of the Texas Highway Department, passed on June 1, 1971, five days *after* this Court entered its stay order of May 27, 1971:

> WHEREAS, there is presently pending on appeal in the United States Court of Appeals for the Fifth Circuit, Cause No. 30915 styled, Named Individual Members of the San Antonio Conservation Society v. Texas Highway Department, et al, and The Department of Transportation, et al, and there is some apparent doubt concerning whether a stay of highway construction should be effected, in part because of apparent doubt concerning the nature of the State's commitment to construct the highway involved; and, because such doubt should not exist;
>
> THEREFORE, IT IS HEREBY AFFIRMED that the commitment of the State of Texas

made by this Commission to build said highway, *is absolute*. The highway will be built with 100% state money if necessary. While this Commission continues to believe that this highway is eligible for federal funding, such eligibility is neither determinative of whether or not the highway will be built, nor of the schedule of its construction.

FURTHERMORE, the construction contracts authorized by this Commission in the Fall of 1970, under which construction is presently proceeding on the end segments of the highway, are in no way contingent upon federal funding. (Emphasis in original)

In addition to presenting us with the foregoing "Minute Order," the State argued before the Supreme Court in its petition for relief from our stay order, and repeated before this Court, the following:

In all candor, it must be admitted that in the event the Secretary of Transportation or the Courts, should rule that federal law prohibits federal participation in the "North Expressway" construction project, other eligible projects will be submitted to take up available federal funding.

We are not impressed with this argument. If we were to accept it, we would be giving approval to the circumvention of an Act of Congress. The North Expressway is now a federal project, and it has been a federal

project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970. As such, the North Expressway is subject to the laws of Congress, and the State as a partner in the construction of the project is bound by those laws.[27] The supremacy of federal law has been recognized as a fundamental principle of our Government since the birth of the Republic. United States Constitution, Art. VI, cl. 2. The State may not subvert that principle by a mere change in bookkeeping or by shifting funds from one project to another.

The State seems to contend that the North Expressway is not yet a federal project because, at the time of oral argument, no federal funds had exchanged hands between the federal and state defendants.[28] This

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[27] This principle has been characterized as "beyond challenge" by the Supreme Court. *See Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295, 78 S.Ct. 1174, 1185 (1958).

[28] The Record in this case reveals that the Secretary of Transportation himself is partially to blame for the State's belief that it may so easily circumvent section 4(f). It appears that at the July 22, 1970 meeting in Secretary Volpe's office, the Secretary agreed that if the State refused to comply with the Secretary's recommendations after the section 4(f) study on the middle "segment" had been completed, the State could then withdraw from the Project and complete it with state funds. This action by the Secretary, coming with his authorization which triggered the commencement of construction on the two "end segments" leading into the Park, was a clear abdication of his section 4(f) responsibilities. The obvious purpose of requiring federal approval of a project *before* federal funding will be allowed is to induce in the construction of the project compliance with some Congressional purpose — like preservation of parklands. *Compare Air Line Pilots Ass'n v. Department of Transportation*, 5th Cir. 1971. ____ F. 2d ____ [No. 29564,

argument misses the point. The point is that on August 13, 1970 the Secretary of Transportation, at the State's request, authorized federal participation in the North Expressway. That authorization triggered the advertisement for contract bids, the letting of contracts, and the commencement of construction that has erected almost 1 3 of the southern "segment" of the North Expressway. No one forced the State to seek federal funding, to accept federal participation, or to commence construction of a federal aid highway. The State, by entering into this venture, voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law. And while this marriage between the federal and state defendants seems to have been an unhappy one, it has produced an already huge concrete offspring whose existence it is impossible for us to ignore.[29]

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slip opinion dated July 12, 1971]. The Secretary's action thwarted the very purpose of section 4(f) and ignored the will of Congress. We note how sharply it contrasts with his original position in February 1970, when he refused to approve *any action* that would permit the Texas Highway Department to complete the North Expressway along a route ineligible for federal participation. *See* note 8 *supra*. He evidenced a much better understanding of his responsibilities under the law in February than he did in July.

[29] At oral argument in this case, the State argued that construction of the two end segments of the North Expressway has proceeded as far as it has "largely because of this Court's and the Supreme Court's actions in November and December of last year." We would remind the State, however, that this case has *never* been presented to this Court or the Supreme Court when things had not gone so far that the granting of a stay would have resulted in considerable financial loss to the defendants. *See* note 11 *supra*. Moreover, we would point out to the State that it was neither this Court nor the Supreme Court, but rather the defendants, who made the decision to commit large

In short, the state, as well as the federal defendants must comply with the law in the completion of the North Expressway.

VIII. Conclusion

The district court erred in granting a summary judgment in favor of the federal and state defendants before the Secretary of Transportation had complied with his statutory responsibilities under 23 U.S.C.A. § 138 (Supp. 1971); 42 U.S.C.A. § 4332 (Supp. 1971); and 49 U.S.C.A. § 1653(f) (Supp. 1971). That judgment is now reversed, and the case is remanded with directions to hold the case until the Secretary has completed his administrative review of the North Expressway as one project under the law. Once the Secretary has completed his review, the district court shall conduct a full review of the case as soon as possible in accordance with the guidelines laid down here and in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S.Ct. 814 (1971). Construction shall not proceed until there has been full compliance with the law.

REVERSED AND REMANDED WITH DIRECTIONS.

CLARK, Circuit Judge, concurring in part and dissenting in part:

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sums of public money to a highly controversial project, *the legality of which was still in question, and over which an appeal was still pending*. Finally, we now know from the *Overton Park* case that courts should not shrink from halting construction of projects such as the North Expressway which are being erected in clear violation of the law.

I completely concur with all of the majority opinion save Part VII, and with the grant of injunctive relief against the federal defendants pending their full compliance with federal law. With deference, however, I dissent from so much of the opinion as holds that we can or should compel the State of Texas to hazard damages or possibly to forfeit the millions of dollars of her taxpayers' money now invested in the construction work which has been accomplished on the two end "segments" and in the parcels of right-of-way bought and paid for over the length of the entire project. See the cases cited in footnote 4 to the majority opinion. I do not say we should condone any form of subterfuge. However, no federal funds have yet been received for or expended on this project and should the State of Texas unqualifiedly renounce any federal fund participation in this project in the future, I cannot conceive of any equitable basis upon which the court below could enjoin the completion of this work as a purely State action. Texas is fortunate to have a tax base large enough to permit her to qualify for all permissible federal fund highway assistance each fiscal year. Thus, I do not see the withdrawal of her unaccepted application for federal funding of this project as any sort of an illicit or improper diversion of funds to thwart national policy. If Texas makes a final disengagement from what appears to me more nearly a proposal than a marriage, then neither Section 4(f) of the Department of Transportation Act of 1966 or the National Environmental Policy Act of 1969 would govern the execution of the remaining construction.

The plaintiffs have suggested that Texas would still be bound by its own law — Tex.Rev.Civ.Stat.Ann. art. 5421q (Supp. 1971), an almost literal embodiment of Section 4(f) — and that the court below would have pendent jurisdiction to enforce this State statute. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966). There has been no development of this jurisdictional issue in that court. But assuming that the district court would have power to adjudicate this claim on such a jurisdictional basis, I believe it should exercise its discretion not to proceed on this wholly State cause of action and thus avoid a needless decision of State law. *See* C. Wright, Law of Federal Courts, 62-65 (2d ed. 1970). The mere fact that State law parallels federal law, without more, is no reason to warrant a federal forum in adjudicating a contention that a State may be violating its own statute. Such litigation ought to be strictly the business of State courts.

To this extent and on the condition set out, I respectfully dissent as to this point.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

APPENDIX E

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30915

NAMED INDIVIDUAL MEMBERS OF THE SAN ANTONIO CONSERVATION SOCIETY, ET AL,
Plaintiffs-Appellants,

versus

THE TEXAS HIGHWAY DEPARTMENT, ET AL., and THE UNITED STATES DEPARTMENT OF TRANSPORTATION, ET AL,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion Aug. 5, 1971, 5 Cir., 1971, ____ F.2d ____)

(September 21, 1971)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

CLARK, Circuit Judge, concurring in part and dissenting in part.

For the reasons set forth in my partial dissent, I also respectfully dissent from the Court's refusal to grant a rehearing as to Part VII of the majority opinion.

Adm. Office U.S. Courts—Scofields' Quality Printers, Inc. N. O. La.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIVISION OF TEXAS

NO. 67-72-A

NAMED INDIVIDUALS

v.

THE TEXAS HIGHWAY DEPARTMENT, ET AL.

ORDER

On August 5, 1971, the Court of Appeals for the Fifth Circuit in their Cause No. 30915 reversed the partial summary judgment this Court granted the defendants in this action on November 13, 1970, and remanded the matter to this Court for further proceedings. A timely motion for rehearing was denied by the Fifth Circuit on September 21, 1971.

In its opinion the Fifth Circuit said that "the case is remanded with directions to hold the case until the Secretary has completed his administrative review of the North Expressway as one project under the law. Once the Secretary has completed his review, the district court shall conduct a full review of the case as soon as possible in accordance with the guidelines laid down here and in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 91 S. Ct. 814 (1971). Construction shall not proceeed until there has been full compliance with the law." (Slip opinion 35).

At the time the Court of Appeals ruled on this case the state was seeking federal assistance in the financing of this highway. The Court of Appeals held that

the Secretary of Transportation had not properly reviewed the project as required by 49 U.S.C. § 1653(f) and 23 U.S.C. § 138 nor had he complied with 42 U. S. C. § 4332.

Since the decision of the Court of Appeals the circumstances have changed in a fashion that the defendants believe legally significant. On October 1, 1971, the Texas Highway Commission adopted a minute order, No. 65383, severing its relationship with the federal government on the total length of the highway in litigation and directing the State Highway Engineer to transmit to the Secretary of Transportation "a notice unequivocally terminating the State of Texas' request for federal aid." That notice was sent to the Federal Highway Administration on October 1, 1971, and the necessary forms for withdrawal were submitted to the federal authorities shortly thereafter.

On the basis of this change in circumstances the state defendants have suggested that this Court no longer has jurisdiction of the case. They argue that the federal statutes cited above have no application to construction of a highway by the state with its own funds, that this project has never been approved for federal funding in accord with 23 U.S.C. §§ 106(a), 110(a), that it never will be federally funded because of the state's withdrawal of its application for funds, and that there is no longer a federal question in the case of which this Court has jurisdiction under 28 U.S.C. § 1331. Alternatively they argue that there are no material issues of fact, that as a matter of law plaintiffs cannot obtain relief against construction of the highway with state funds, and that they are entitled to summary judgment under Rule 56.

The argument of the state defendants is persuasive but this Court is not clear that it is free to weigh the merits of that argument. In its opinion a majority of the panel of the Court of Appeals said: "The North

Expressway is now a federal project, and it has been a federal project since the Secretary of Transportation authorized federal participation in the project on August 13, 1970." (Slip opinion 32-33). Again they said: "In short, the state, as well as the federal defendants must comply with the law in the completion of the North Expressway." (Slip opinion 35). This language can certainly be read to mean that the state is permanently barred from completing the North Expressway along a route ineligible for federal participation. Only the Court of Appeals can say with assurance whether its holding goes that far. It is not for a lower court to say that the appellate court meant less than it seemed to say.

Clearly it is in the interest of all of the parties, and of the public, to have the question posed by the change in circumstances and the motion of the state defendants definitively answered as soon as possible. Millions of dollars have already been spent on this project and the uncompleted work poses hazards to safety and welfare. If defendants are right in their view, this litigation would be terminated and they would be free to resume construction on the highway. If they are wrong, and the fact that they once applied for federal funds bars them permanently from construction of the highway until the Secretary has found that it satisfies the requirements of federal law, they should know this so they can proceed, if they choose, to seek federal approval though they are no longer seeking federal funds. The circumstances on which the state defendants now rely are not a part of the record that was before the Court of Appeals when it ruled on this case and a petition for certiorari for review by the Supreme Court of the judgment of the Court of Appeals could not reach the question presented now in the light of these changed circumstances.

In the interest of obtaining an authoritative answer to this question, the motions of the state defendants

are denied. In accordance with 28 U.S.C. § 1292(b) the Court certifies that this order involves a controlling question of law whether a state that has once sought federal highway funds may thereafter unequivocally withdraw its application and construct the highway with its own funds without securing approval from the federal government. The Court further certifies that there is substantial ground for difference of opinion on this question and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

MOTIONS DENIED

JACK ROBERTS
District Judge

Signed and entered this 28th Day of October, 1971.

82 Stat. 823

SEC. 18. (a) Section 138 of title 23, United States Code, is amended to read as follows:

"§ 138. Preservation of Parklands

"It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate

[82 Stat. 824]

and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

(b) Section 4(f) of the Department of Transportation Act (80 Stat. 931; Public Law 89-670) is amended to read as follows: 49 USC 1653.

"(f) It is hereby declared to be the national policy that special effort should be made to preserve the natu-

ral beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use."

APPENDIX H

83 Stat. 853, 42 U.S.C. § 4332.

Sec. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall— Administrati

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by Section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71- 1198

THE TEXAS HIGHWAY DEPARTMENT, ET AL., *Petitioners*,

v.

NAMED INDIVIDUALS, *Respondents*.

MEMORANDUM OF AMICUS CURIAE IN SUPPORT OF STATE'S PETITION FOR WRIT OF CERTIORARI

HOWARD C. WALKER
City Attorney
City of San Antonio, Texas

TO SAID HONORABLE COURT:

Now comes the CITY OF SAN ANTONIO, Amicus Curiae, by and through its undersigned attorney, and joins, supports and adopts the Petition for Writ of Certiorari filed herein by the Texas State Highway Department. This memorandum of Amicus Curiae is filed pursuant to Rule 42-4 of this Honorable Court.

SAN ANTONIO'S POSITION

San Antonio believes that the August 5, 1971 decision of the Fifth Circuit Court in this controversy reached the correct result in the state of the record then existing. San Antonio does not agree with one portion of the opinion in that case, however. That portion, in context follows:

> No one forced the State to seek federal funding, to accept federal participation, or to commence construction of a federal aid highway. The State, by entering into this venture voluntarily submitted itself to federal law. It entered with its eyes open, having more than adequate warning of the controversial nature of the project and of the applicable law. And while this marriage between the federal and state defendants seems to have been an already unhappy one, it has produced an already huge concrete offspring whose existence it is impossible for us to ignore. (emphasis added).

It is the emphasized portion of the foregoing with which San Antonio disagrees. The rest is correct.

We disagree that the State of Texas ever entered into a marriage with the Department of Transportation. Long before the State applied for federal funds, which application activated the subject Federal Statutes, the State and San Antonio had entered into a contract involving the subject expressway.

San Antonio was to acquire the necessary land that it did not already own, by eminent domain proceedings or otherwise, and convey this land to the State, the latter to pay one-half the cost thereof. The State was to build the expressway without further cost to San Antonio. Acquisition of federal funding by the State was not a condition to the State's performance of its part of the joint project.

This State - San Antonio contract was executed in 1961. Over the next five years there were two lawsuits brought by the expressway's enemies against the State and San Antonio and both of such cases resulted in judgments in favor of the defendants. City of San Antonio vs. Congregation of Sisters of Charity of the Incarnate Word, 360SW (2) 580, cert. den., 83 Sup. Ct. 1093; same style, 404SW (2) 333. The plaintiffs in these cases were essentially the tool of persons presently financing the case at bar, although the Sisters did ultimately receive almost One Million ($1,000,000.00) Dollars from the State and San Antonio for what their lawyer called a "campus" and what was actually a rock gully. San Antonio not only carried the laboring oar in these cases, but paid about two-thirds of the above sum to the plaintiff.

After these cases were terminated, San Antonio proceeded to fulfill its end of the subject State - San Antonio contract and as of 1968 has spent about Four Million ($4,000,000.00) Dollars for land acquisition in this connection.

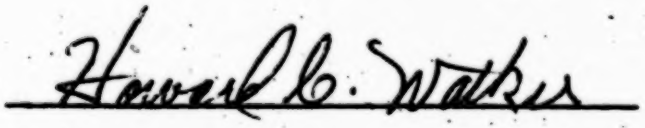
It should be added that San Antonio was compelled, in 1961, to call a bond election to raise the money for both the expressway land and for additional parksland. This election resulted in a 2-1 vote in favor of bonds for both purposes. San Antonio has acquired, since 1961, over one thousand (1,000) acres of additional parksland which it has improved and dedicated to parks purposes. The parksland taken by the expressway does not exceed twenty (20) acres.

As the situation now stands, San Antonio contains a nine (9) mile strip of cleared land, vacant except for dirt "fill" and a considerable amount of concrete, owned by the State, running from near San Antonio's outlying International Airport to near San Antonio's central area. (Please refer to San Antonio Light News story, attached as appendix "A"). San Antonio cannot even make comprehensive traffic control plans for its northern section because of the impasse manifested in this case.

It is respectfully submitted that neither San Antonio nor its citizens should be left any longer than necessary in thier present state of uncertainty and frustration.

Respectfully submitted,

HOWARD C. WALKER
City Attorney, City of San Antonio



(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.